UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
CYRUS II, LP	§	CASE NO. 05-39857-H1-7
BAHAR DEVELOPMENT, INC.	§	(Jointly Administered)
MONDONA RAFIZADEH, et al.,	§	
	§	
Debtors	§	Chapter 7
	§	

RODNEY D. TOW,	§	
AS THE CHAPTER 7 TRUSTEE FOR	§	
CYRUS II, L.P., et al	§	
	§	
Plaintiffs	§	ADVERSARY PROCEEDING
	§	NO. 07-03301
VS.	§	
	§	
SCHUMANN RAFIZADEH, et al	§	
	§	
Defendants	§	

MOTION OF WELLSPRING SOURCING, CO., LIMITED TO DISMISS FOR INSUFFICIENCY OF PROCESS AND SERVICE OF PROCESS

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 20 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

WELLSPRING SOURCING CO., LIMITED, ("Movant"), specially appearing herein for the sole purpose of seeking dismissal of this action for insufficiency of process and service of process, files its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(4) and (5) and respectfully would show the Court the following:

I.

SUMMARY OF RELIEF REQUESTED

1. The process purportedly issued to Movant in this case is insufficient as a matter of law because it does not name Movant. No summons has ever been issued to Movant, whose correct name is "Wellspring Sourcing, Co., Limited", a foreign organization chartered under the laws of Hong Kong, Special Administrative Region ("S.A.R.").

2. Plaintiffs admitted long ago that "Wellspring Sourcing, Inc." was not the correct name of the entity they intended to join as a party Defendant.[1] Despite this fact, they have never sought the issuance of an alias or amended summons, have never changed the caption of the adversary proceeding and have never sought leave to amend the complaint to name Movant as a party.[2] The only summons issued to any named party Defendant with the word "Wellspring" in it was issued to "Wellspring Sourcing, Inc." Since the summons is not issued to Movant the Court must dismiss the Complaint and any supplements thereto as against Movant pursuant to Fed. R. Civ. P. 12(b)(4).

3. The process issued in this adversary proceeding is insufficient for

[1] See Supplemental Complaint, ¶ 374 (Doc. No. 290), filed October 29, 2008.

[2] Plaintiffs Motion for Leave to File Verified Supplemental Complaint (Doc. No. 286) mentions nothing about amending the Complaint to name properly Wellspring Sourcing Co., Limited. Moreover, Plaintiffs have never sought issuance of process with which to serve Wellspring Sourcing Co., Limited with the Supplemental Complaints.

the further reason that Movant is organized under the laws of Hong Kong, S.A.R. Both the People's Republic of China and Hong Kong, S.A.R. are signatories to the Hague Convention. As such, it was mandatory for the process to be served to be directed to the Hong Kong Central Authority and the Central Authority of the People's Republic of China and to include Form USM-94, entitled "Request for Service Abroad of Judicial or Extrajudicial Documents." Since the "process" Plaintiffs claim to have "served" in Hong Kong did not include Form USM-94, the process was insufficient as a matter of law, requiring dismissal under Fed. R. Civ. P. 12(b)(4).

4. The purported service of process on Movant was insufficient (if not comically inept) for its failure to comply with the procedures provided under Fed. R. Civ. P. 4(h)(2) and the Hague Convention. Instead of serving the complaint with both a summons and a Form USM-94, properly executed and naming Movant's correct legal name, on the Central Authorities of Hong Kong and China and providing proof of both acceptance of the process by the Central Authorities and, in turn, the service of the summons, Form USM-94 and the complaint on Movant, Plaintiffs hired a local "private eye", a Mr. Curlewis, who claims to have personally delivered the process to an unknown secretary at an address in Hong Kong and to have emailed the process to an email address he claims to have found in a public filing by Movant. Mr. Curlewis also has testified that he personally delivered the process in Shanghai to a person he believes was Vafa Motlagh's mother in law. Service by personal delivery outside the United Stated is expressly prohibited by Fed. R. Civ. P. 4(h)(2).

Service by email does not comply with the Hague Convention.

5. It is difficult to imagine how Plaintiffs can argue proper service of process on Movant with a straight face, much less with proper regard for their responsibilities under the Hague Convention. Plaintiffs admit in paragraph 43 of the Complaint that the proper place for service on Wellspring Sourcing, Inc. under the Hague Convention is "the Central Authority of China, Ministry of Justice, Department of Judicial Assistance and Foreign Affairs" and names the address. Movant anticipates Plaintiffs will argue that while they did not comply with service under the Hague Convention, they did comply with the procedures authorized under Hong Kong law.

6. Unfortunately, in so doing they meet themselves coming around the bend because they previously filed their Expedited Motion for Order Modifying Date by Which Defendant Wellspring Sourcing, Inc. Must Respond to Complaint (Doc. No. 114) in which they alleged that (a) the 30 day response language in the Summons issued to Wellspring Sourcing, Inc. would prohibit "service through the Hague Convention" and (b) that the Court should enter an "order that Wellspring Sourcing respond or otherwise answer the Complaint within 30 days from the date of service of the Complaint through the Hague Convention." Even if personal service of the process by a process server in Hong Kong, S.A.R. was consistent with local law, Fed. R. Civ. P. 4(h)(2) expressly prohibits personal delivery of process on foreign organizations outside the United States.

7. Since it is obvious from the text of Plaintiffs' Motion for Default and

for Issuance of Default Judgment and the evidence submitted in support of service that neither Movant nor Wellspring Sourcing, Inc. nor any other entity with "Wellspring" in its name, were served with process under the Hague Convention, the event triggering an obligation to answer has not occurred. Furthermore, the insufficiency of service of process on Movant warrants dismissal under Fed. R. Civ. P. 12(b)(5) since the summons and Form USM-94 were not served pursuant to the Hague Convention, as required by Fed. R. Civ. P. 4(f)(1), made applicable to foreign organizations by Fed. R. Civ. P. 4(h)(2).

II.

PROCEDURAL BACKGROUND

8. The Complaint filed on June 21, 2007 in this adversary proceeding (Doc. No. 1) names "Wellspring Sourcing, Inc."[3] as a defendant.

9. Plaintiffs requested issuance of a Summons on "Wellspring Sourcing, Inc." on June 21, 2007. (Doc. No. 26).

10. A Summons was issued to "Wellspring Sourcing, Inc." on June 22, 2007. (Doc. No. 27).

11. A Return of Service of the Summons issued to "Wellspring Sourcing, Inc." was filed on June 26, 2008, purportedly showing service via certified mail, return receipt requested on Wellspring Sourcing, Inc., c/o Vafa Motlagh, 2303 Shroyer Road, Dayton, Ohio, 45419.[4]

12. On August 22, 2007, Plaintiffs filed their Expedited Motion for Order Modifying Date by Which Defendant Wellspring Sourcing, Inc. Must

[3] See caption and party identification at ¶ 43.
[4] Plaintiffs do not even attempt to argue that service at the Ohio address was proper.

Respond to Complaint (Doc. No. 114), which was granted by Order entered August 23, 2007 (Doc. 115).

13. On October 29, 2007, the Court held a hearing on the request of Plaintiffs for preliminary injunctive relief. The Court entered its Order granting a preliminary injunction against Defendant Wellspring Sourcing, Inc. on October 30, 2007 (Doc. 282).

14. On April 9, 2008, Plaintiffs filed their Motion Requesting Entry of Default and Issuance of Default Judgment Against Wellspring Sourcing, Inc. ("Motion for Default") (Doc. 516).

III.

ARGUMENTS AND AUTHORITIES

A. The complaint must be dismissed for insufficiency of process pursuant to Fed. R. Civ P. 12(b)(4).

15. Under Bankruptcy Rule 7004(a) (1), "[e]xcept as provided in Rule 7004(b)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F. R. Civ. P. applies in adversary proceedings." Pursuant to Fed. R. Civ. P. (4)(a)(1), a summons must (A) name the parties and (B) be directed to the Defendant. Rule 12(b)(4) provides the proper method to challenge to process when it is alleged that the summons and complaint do not properly name the party on whom the summons and complaint are served. "[A] Rule 12(b)(4) motion is proper only to challenge non-compliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the contents of the summons." 5B Charles A. Wright & Arthur Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1353 (2004). "When the alleged defect is that the

Defendant either is misnamed in the summons or has ceased to exist, … the form of the process could be challenged under Rule 12(b)(4) on the theory of the summons does not properly contain the name of the parties." *Id.*

16. Plaintiffs have judicially admitted and the Court has found that the party actually named in the summons and complaint, "Wellspring Sourcing, Inc.", is not correctly named and that the correct name of the entity is "Wellspring Sourcing Co. Ltd."[5] Movant, the actual entity that is chartered under the laws of Hong Kong, S.A.R., is not named in the summons and complaint. As a matter of law, therefore, the summons does not comply with Fed. R. Civ. P. Rule (4)(a)(1)(A) and (B) and the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(4).

17. Plaintiffs have sought leave on two occasions to file "supplemental" complaints. However, in each instance, despite apparently being aware since at least October of 2007 that Wellspring Sourcing, Inc. was not the party they wished to join as a Defendant, they have taken no action to obtain leave to amend the complaint under Fed. R. Civ. P. 15(c)(1)(C) to change the name of a party or add Wellspring Sourcing Co., Limited as a party. Thus, Wellspring Sourcing Co., Limited is not even named as a party and the Court has acquired no personal jurisdiction over it. *Gorman v. Ameritrade Holding Corp.* 293 F.3d 506, 514 (D.C. Cir. 2002).

18. If a misnomer or mistake on the part of the Plaintiff constitutes a fatal defect, that is, a defect of substance and not merely one of form, the

[5] This description of Movant's name is incorrect since the word "Limited" is spelled out rather than abbreviated as "Ltd."

process would be void *ab initio* and … there would be, as recognized by Rule 12(b), both insufficiency of process and insufficiency of service of process." *Shaw v. Rogers,* 2006 U.S. Dis. LEXIS 38898, *6 (S.D. Miss. 2007) quoting *Sweeney v. Greenwood Index – Journal*, 37 F.Supp. 484 (D.C.S.C 1941). In *Sweeney*, a libel action was filed against the "Greenwood Index – Journal Co., Inc." *Id.* at 486. In the body of the complaint, the Defendant is referred to as "the Greenwood Index – Journal Co." *Id.* An entity called "The Index – Journal Co." filed a Motion to Dismiss for Insufficiency of Process and Service of Process pursuant to Civ. P. 12(b)(4) and (5). The Court found that the defect in the summons and complaint were material in substance and not a mere matter of form and as a result, the Court granted the motion to dismiss and denied the plaintiff's motion for leave to amend the complaint to name the proper party. *Id.* at pp. 486-88.

19. Depending on the facts, a plaintiff who has misnamed a defendant may seek leave to amend to name the party properly. *See* Fed. R. Civ. P. 15(c)(1)(C); *Grandey v. Pacific Indem. Co.*, 217 F.2d 27, 29 (5th Cir. 1954). However, that circumstance is not before the Court because, despite knowledge of the true name of Movant and the fact that all of Plaintiffs' claims are time barred, Plaintiffs have not sought leave to amend[6] to properly name Movant and must not be allowed to do so at this late date. Furthermore, it is not clear

[6] Despite outlining in detail at ¶¶ 1, 8 and 9 of Plaintiffs' Motion for Leave to File Verified Supplemental Complaint (Doc. No. 286) the various parties and claims to be added in the Supplemental Complaint, not a word is said about amending the Complaint to properly name or add as a party Wellspring Sourcing Co., Limited. Furthermore, the motion does not request leave to amend pursuant to Fed. R. Civ. P. 15(c)(1)(C), but rather restricts the relief requested to Fed. R. Civ. P. 15(a). However, Plaintiffs now move for default against "Wellspring Sourcing, Inc. a/k/a Wellspring Sourcing Co., Limited" as if they had sought and obtained leave to name Wellspring Sourcing Co., Limited as a party.

whether there was a misnomer involved or that Plaintiffs simply did not know Wellspring Sourcing Co., Limited existed. Accordingly, the complaint and its supplements should be dismissed as to Movant pursuant to Fed. R. Civ. P. 12(b)(4).

B. The complaint must be dismissed for insufficiency of service of process pursuant to Fed. Civ. P. 12(b)(5).

20. In paragraph 12 of their Motion for Default, Plaintiffs describe their theory supporting alleged proper service of process on Movant:

> Service on Wellspring was proper pursuant to Fed. Rule 4(f)(2)(A), which allows service to be effected *as prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction.* Service on Wellspring was in accordance with § 356 of Hong Kong's Companies Ordinance, which states: '*A document may be served on a company by leaving it at or sending it by post to the registered office of the company.'*

What Plaintiffs conveniently omit is an explanation of how service could possibly have been proper pursuant to Fed R. Civ. P. 4(f)(2)(A) since that provision is only applicable "if there is no internationally agreed means."

21. Since it is undisputed that the Hague Convention is applicable to the both Hong Kong, S.A.R. and the Peoples Republic of China, there is an "internationally agreed means" of service. It follows that service of process on Movant must have been accomplished, if at all, pursuant to Fed. R. Civ. P. 4(f)(1). Furthermore, if an action involves "service abroad", compliance with the provisions of the Hague Convention is mandatory, not optional, with respect to any transmission that Article I covers. *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 699, 708, 108 S. Ct. 2104 (1988). The purported service of process on Movant in Hong Kong, S.A.R. and in the People's Republic

of China clearly involved "service abroad."

22. None of the actual methods of service employed by Plaintiffs satisfy the Hague Convention. Plaintiffs' private process server claims to have made personal delivery of the summons and complaint at Movant's registered office in Hong Kong. (he also testified that he personally delivered the summons and complaint to a person he believed to have been Vafa Motlagh's mother-in-law in Shanghai, China, but that is not mentioned in his affidavit in support of the Motion for Default). Finally, the process server claims to have sent an email allegedly directed to Movant which contained the summons, complaint and other attachments.

23. It is unnecessary to consider whether the requirements of the Hague Convention were satisfied by personal delivery because one need go no further than Fed. R. Civ. P. 4(h)(2), which specifically excludes "personal delivery" as an acceptable method of service, to conclude that such service was improper. Thus, as a matter of law, the alleged service by Mr. Curlewis "by delivering the same to its registered office at Unit B, 10/F China Overseas Building, 139 Hennessy Road, 1 Wanchai, Hong Kong enclosed in a sealed envelope and properly addressed to Wellspring" was defective. Mr. Curlewis' service by personal delivery violates Fed. Civ. P. 4(h)(2) and is not a "sufficient" method of service of process. There is no authority cited by Plaintiffs in support of service by email, but the Fifth Circuit has held that service by mail does not comply with the Hague Convention, *Nuovo Pignone, SPA v. Storman Asia M/V*, 310 F.3d 374, 384-85 (5th Cir. 2002), and there is no discernable

reason why service by email would fare any differently.

24. The Hague Convention provides an "internationally agreed means of service that is reasonably calculated to give notice" pursuant to Fed. R. Civ. P. 4(f)(1). The Hague Convention, by its very terms, preempts inconsistent methods of service prescribed by state law and all cases to which it applies. CONVENTION ON SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, Nov. 15, 1965, 20 U.S.T. 361, 362 T.I.A.S. No. 6638, *reprinted in* 28 U.S.C.A. Fed. R. Civ. P. 4; *Schlunk,* 486 U.S. at 699. Each signatory to the Hague Convention must designate a Central Authority to receive requests for service coming from other countries. Hague Convention, Art.; *Schlunk;* 486 U.S. at 698; 108 S. Ct. at 2107.

25. The Central Authority designated for the Peoples Republic of China is The Ministry of Justice of the Peoples Republic of China, Bureau of International Judicial Assistance.[7] Under Article 18 of the Hague Convention, the Peoples Republic of China designated the Chief Secretary for Administration of Hong Kong S.A.R. as the "other authority" for Hong Kong, S.A.R.[8]

26. An examination of the evidence submitted by Plaintiffs in support of service of process on Movant indicates that no service on the Central Authorities of the Peoples Republic of China or Hong Kong Special, S.A.R. was effected. Furthermore, Plaintiffs do not offer evidence that Form USM-94 was

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[7] Martindale-Hubbell Law Digest – 2007, Selected International Conventions, CONVENTION OF THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, p. IC-5, n. 3a.
[8] *Id.*; *See also* U.S. Department of State, Bureau of Consular Affairs website "Hong Kong Judicial Assistance", http://travel.state.gov/law/info/judicial/judicial_650.html#.

transmitted to the Central Authorities of the Peoples Republic of China or the Hong Kong Special, S.A.R. The Central Authority's return of a completed certificate of service utilizing Form USM-94 is *prima facie* evidence that service was made in compliance with the Hague Convention. *Northrup King Co. v. Compania Productora Semillias Algodoneras Selectas, S.A.,* 51 F.3d 1383, 1389-90 (8th Cir. 1995). There is no return of service from the Central Authorities of the Peoples Republic of China or Hong Kong, S.A.R., so it is axiomatic that there is no competent evidence of service.

27. Pursuant to the Federal Rules of Civil Procedure, the Court is authorized to dismiss a civil action for insufficiency of service of process. Fed. R. Civ. P. 12(b)(5); see also *Kreimerman v. Casa Veerkamp*, S.A. de C.V., 22 F.3d 634, 645 (5th Cir. 1994) ("A district court … has broad discretion to dismiss an action for ineffective service of process …"). Absent proper service of process, the Court cannot exercise jurisdiction over a party named as a defendant and any default judgment or other order entered without proper service is void. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344, 350, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999); *Rogers v. Hartford Life and Accident Ins. Co.,* 167 F.3d 933, 940 (5th Cir. 1999); *United States, ex rel. v. Computer Scis. Corp.*, 246 F.R.D. 22, 26 (D.D.C. 2007).[9]

28. Service of process in this matter is insufficient as a matter of law

[9] The adoption of the Federal Rules of Civil Procedure essentially eliminated the need for a "special appearance" in order the object to jurisdiction. 1A Baron & Holtzoff, FEDERAL PRACTICE AND PROCEDURE, § 343 (1960). Rather, after the enactment of Rule 12, a defendant may assert a jurisdiction defense despite his appearance in the case by filing a Rule 12 motion. *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d, 874 (3rd Cir. 1944), *cert. denied,* 322 U.S. 740 (1944).

because: (1) the summons and complaint do not name Movant; (2) the process did not include Form USM-94 properly filled out in accordance with the Hague Convention; (3) the process, complaint and Form USM-94 were not served on either the Central Authority of the Peoples Republic of China or of the Hong Kong Special Administrative Region; (4) because the process was not served upon the appropriate Central Authorities, the process was not served by the Central Authorities upon Movant; (5) there is no appropriate return of service utilizing the forms prescribed by the Hague Convention, specifically including Form USM-94; (6) the attempt at "service abroad" by a private process server making direct personal delivery to a foreign organization violates Fed. R. Civ. P. 4(h)(2), which specifically excludes "personal delivery" as an acceptable method of service, and fails to comply with the requirement that service be made on the Central Authority; and (7) the attempt at "service abroad" by email directly to the party in question, does not satisfy the Hague Convention. Accordingly, the complaint and all supplements must be dismissed as to Movant pursuant to Fed. R. Civ. P. 12(b)(5).

IV.

CONCLUSION AND RELIEF REQUESTED

29. The evidence submitted by Plaintiffs in support of their Motion for Default shows, on its face, both the insufficiency of the process employed by Plaintiffs and the insufficiency of the service of process under Rule 4 and the Hague Convention. As a result, this Court has no jurisdiction over Movant and any attempts to exercise jurisdiction over Movant are void. Movant has

satisfied its burden of proof under Fed R. Civ. P. 12(b)(4) and (5) and Plaintiffs cannot overcome the defects in the process and service of process they purportedly employed against Movant. Movant requests that the Court enter an order dismissing the complaint and its supplements as against Movant.

Respectfully submitted,

BARNET B. SKELTON, JR., P.C.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was filed electronically on April 24, 2008 in compliance with Local Rule LR5.3. As such, this response was served on all counsel of record who are deemed to have consented to electronic service. Pursuant to Fed.R.Civ.P. 5(d) and Local Rule LR5.3, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing instrument by U.S. First Class Mail and/or facsimile on the 24th day of April, 2008.

/s/ *Barnet B. Skelton, Jr.*
BARNET B. SKELTON, JR.